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United States District Court,
District of Columbia.

FEDERAL ELECTION COMMISSION, Plaintiff,
v.
The CHRISTIAN COALITION, Defendant.

No. CIV. A. 96-1781(JHG).

Aug. 2, 1999.

Enforcement action was brought by the Federal Election Commission (FEC), alleging that ideological corporation violated federal campaign finance laws during congressional elections in 1990, 1992 and 1994, and the presidential election in 1992. Upon cross-motions for summary judgment, the District Court, Joyce Hens Green, J., held that: (1) corporation's chairman's cover letter in national "Reclaim America" direct mail solicitation did not violate Federal Election Campaign Act's (FECA) prohibition on independent expenditures containing "express advocacy;" (2) corporation's Georgia mailing violated FECA's "express advocacy" prohibition; (3) corporation's expenditures on voter guides and get-out-the-vote telephone solicitations did not violate FECA contribution prohibition on expressive coordinated expenditures; and (4) corporation violated FECA's prohibition on expressive coordinated expenditures by providing senatorial campaign with valuable mailing list.

Both motions granted in part and denied in part.

West Headnotes

[1] Elections  **317.2**
[144k317.2 Most Cited Cases](#)

[1] Elections  **317.5**
[144k317.5 Most Cited Cases](#)

Attributes necessary to application of Federal Election Campaign Act's (FECA) prohibition on independent expenditures containing "express advocacy" are: (1) communication must in effect contain an explicit directive; (2) verb or its immediate equivalent, considered in the context of the entire communication, including its temporal proximity to the election, must unmistakably exhort the reader/viewer/listener to take electoral action to support the election or defeat of a clearly identified

candidate; and (3) issue of whether a reasonable person would understand a communication to expressly advocate a candidate's election or defeat must be decided solely as a matter of law, with the only predicate factual determinations being identification of the speaker and the communication's contents. Federal Election Campaign Act of 1971, § 316, as amended, [2 U.S.C.A. § 441b](#).

[2] Elections  **317.2**
[144k317.2 Most Cited Cases](#)

Ideological corporation's executive director's Montana speech did not violate Federal Election Campaign Act's (FECA) prohibition on independent expenditures containing "express advocacy;" although implicit, director avoided providing an explicit directive to "knock off" Democratic incumbent and exhibited precisely the ingenuity and resourcefulness in his verb choice that the [Buckley](#) court envisioned possible to circumvent the prohibition on express advocacy. Federal Election Campaign Act of 1971, § 316, as amended, [2 U.S.C.A. § 441b](#).

[3] Elections  **317.2**
[144k317.2 Most Cited Cases](#)

Ideological corporation's chairman's cover letter in national "Reclaim America" direct mail solicitation, which directed the reader to support the election of those incumbents rated favorably in corporation's Congressional scorecard and the defeat of those rated unfavorably in the November 1994 elections, did not violate Federal Election Campaign Act's (FECA) prohibition on independent expenditures containing "express advocacy;" while it may have been implicit, the message that "Christian voters" should "hold their Congressmen accountable" and "distinguish" which Congressmen supported the corporation's views by voting in favor of those with a high percentage of agreement and in favor of the opponent of those with a low percentage of agreement, the statements did not direct the reader to take electoral action. Federal Election Campaign Act of 1971, § 316, as amended, [2 U.S.C.A. § 441b](#).

[4] Elections  **317.2**
[144k317.2 Most Cited Cases](#)

Ideological corporation's Georgia mailing, which was expressly directed at the reader-as-voter, violated Federal Election Campaign Act's (FECA) prohibition on independent expenditures containing "express advocacy;" letter in effect was explicit that the reader

MCFL. See Minnesota Citizens Concerned for Life v. Federal Election Comm'n, 113 F.3d 129, 133 (8th Cir.1997).

In this case, the Coalition asserted the MCFL exception as an affirmative defense and counterclaim. However, during discovery the Coalition was unable to, or deliberately chose not to, provide the FEC with responsive information concerning its eligibility for the MCFL exception. In response to a motion by the FEC, the Coalition dropped its MCFL defense and stipulated:

The Christian Coalition will not attempt to reassert any affirmative defense or counterclaim in this litigation based on the holding of [MCFL]. This stipulation and order will apply only to this litigation and The Christian Coalition is not precluded in any future litigation from seeking to prove such defense or counterclaim.

See Stip. and Order of Feb. 17, 1998 ¶ 1. Regardless of whether the MCFL defense is properly asserted by affirmative defense or counterclaim (in which case the party asserting the defense bears the burden of proof), the Court understands the stipulation to mean that the parties agree that § 441b can constitutionally be applied to the Coalition. Consequently, because one of the three communications complained of contains prohibited "express advocacy," the FEC's motion as to Count III will be granted in part and denied in part, as will the Coalition's.

V. COUNTS I AND II: FACTS CONCERNING COORDINATED EXPENDITURES

In addition to alleging that the Coalition engaged in prohibited express advocacy, the FEC also alleges that the Coalition violated the FECA in relation to other communications--principally its voter guides. The FEC acknowledges that these guides, which compare candidates' positions on select issues, did not contain express advocacy. However, the FEC asserts that the voter guides were not protected independent expenditures because the Coalition shared information with various campaigns, including the 1992 reelection campaign of President Bush, to such an extent that the Coalition voter guides should be treated for FECA purposes as literature distributed on behalf of the campaign and paid for by the Coalition. On this view, the Coalition's expenditures on its voter guides were illegal in-kind corporate contributions.

A. Expenditures for 1992 Presidential Election

President George Bush and Pat Robertson are both the sons of United States Senators. They came to know each other while Bush was Vice President. At Bush's invitation, Robertson joined him in a relief mission to Sudan in 1985. In 1988, then-Vice President Bush and Robertson both sought the Republican nomination to run for President of the United States. After Robertson withdrew from the race, he endorsed Bush's candidacy and spoke on Bush's behalf on several occasions, including at the 1988 Republican National Convention in New Orleans. Bush and Robertson each testified that they were "friends." See FEC Ex. 7 (Bush Dep.) at 11; FEC Ex. 63 (Robertson Dep.) at 74.

*67 George Bush was elected President of the United States in the November 1988 general election. President Bush and Vice President Quayle were candidates for reelection in 1992. [FN30]

FN30. Bush-Quayle '92 Primary Committee, Inc. was the authorized political committee of President Bush and Vice President Quayle for their 1992 campaign for the nomination of the Republican Party for President and Vice-President of the United States. Bush-Quayle '92 General Committee, Inc. was the authorized political committee for the 1992 general election campaign. See 2 U.S.C. § § 431(4)-(6).

In late 1990 or early 1991, Robertson contacted then-White House Chief of Staff John Sununu and requested a meeting with President Bush. Robertson subsequently met with President Bush, Sununu and Leigh Ann Metzger, Deputy Assistant to the President for Public Liaison, in the Oval Office on January 9, 1991, immediately prior to the Persian Gulf War.

During the meeting, Robertson offered his personal support for Bush's reelection campaign and pledged to support the President's reelection efforts in 1992. On the same day, Reed sent a brief follow-up letter on Christian Coalition stationery to Metzger. See FEC Ex. 035-0112 ("Pat said the meeting with the President today went very well. We are looking forward to helping in any way we can."). Robertson publicly endorsed Bush's candidacy for reelection in early 1991.

Despite Robertson's personal support for President Bush, the Coalition continued to vigorously lobby the Administration. For example, in April 25, 1991,

Reed wrote to Special Assistant to the President Ronald Kaufman concerning funding by the National Endowment for the Arts of art the Coalition considered to be offensive. After advising Kaufman of the Coalition's lobbying of Governor Chiles in Florida concerning state funding of similar projects, Reed chastised: "It is somewhat ironic that we are getting more action on this issue from a liberal Democratic Governor than we have seen out of the Bush administration." FEC Ex. 035-0255.

At a June 26, 1991 Coalition Board of Directors meeting, the Board identified as strategic goals the need to (1) control the Republican National Convention, to prevent the party from removing the "pro-life plank" from its platform; (2) control the Republican National Committee for the same reasons; and (3) distribute voter guides in "swing" senatorial elections; that is, in elections that were considered close.

The Coalition's focus on voter guide distribution had grown. The Coalition had distributed voter guides in seven states during the 1990 elections and in two states in 1991. The Coalition had ambitious plans to distribute voter guides nationwide during the 1992 elections. In an August 1991 memorandum to the Coalition's state directors entitled "Legal Compliance In The Printing And Distribution Of Voter Guides," Reed cautioned that because the state affiliates were corporations, Coalition-funded voter guides could not expressly advocate the election or defeat of specific candidates. Reed also advised that voter guides not be distributed only in churches and that voter guides include candidate positions on ten to twelve issues. Reed informed them of the [MCFL](#) exception for independent expenditures on express advocacy but warned:

[U]nder FEC law and most state election laws, the expenditure must be truly independent, which generally means no communication, coordination, or cooperation with the candidate, the campaign, or an officer or staff member of the campaign. This often places unrealistic strictures on grassroots volunteer organizations (whose members are often also working on behalf of the candidate as volunteers). It also places you at the mercy of the FEC or state elections regulatory agency to determine whether or not you have communicated with or coordinated your activities with the candidate or his campaign.

FEC Ex. 004-1350-52.

In November 1991, the Coalition sponsored its first annual "Road to Victory" *68 conference in Virginia Beach, Virginia. At Robertson's invitation, Vice

President Quayle addressed the conference. Reed consulted with Quayle's speechwriter and spoke in general terms about what Quayle would say. In his opening remarks, Quayle stated: "[B]ecause of you, and your dedication, and your commitment, once again you will join me, Pat and others in making sure that the liberals are defeated and George Bush is elected to the Presidency once again." FEC Ex. 87 at 13. [FN31](#)

[FN31](#). In a Conciliation Agreement reached with the FEC, the Bush- Quayle Committee conceded that Quayle's express advocacy of the reelection of President Bush made this a campaign appearance for which the campaign should have provided travel rather than an official appearance. The Committee agreed to reimburse the Government for part of Quayle's travel expenses on Air Force Two.

In late 1991 and early 1992, Robertson lobbied various senior officials of the Bush-Quayle '92 campaign, such as its chairman, Robert Teeter, and campaign manager, Fred Malek, to appoint Coalition members to leadership positions in the campaign within their respective states. On February 11, 1992, shortly before President Bush announced his candidacy for reelection, Robertson met privately with the President. Metzger met with Robertson immediately thereafter and recorded her understanding in a memorandum to Chief of Staff Samuel Skinner that Robertson had raised issues such as "education choice, pro- life platform for the GOP convention, and specific pro-family economic proposals." See FEC Ex. 035-000095. In the memorandum to Skinner, Metzger advised that Robertson sought to meet with Skinner to discuss, among other things, a:

Proposal for a private, quiet meeting with 10-12 key evangelical leaders in Chicago on September 25th. The purpose of this would be to bring in several leaders who have expressed a desire to distribute the Christian Coalition voter guides. Many of these leaders for one reason or another have never meet [sic] with the President and this would solidify their commitment to participate in the program.

Id.

The Republican party presidential primary elections began in February 1992. One of the early or "second wave" primary elections was the March 3, 1992 election in Georgia. Bush-Quayle '92 viewed the

Georgia primary election to be of particular importance for two reasons. First, President Bush was being challenged by Patrick Buchanan in Georgia. Bush-Quayle '92 viewed Buchanan as appealing to "the Christian Evangelical voter," a constituency the Bush campaign considered important. Second, the Georgia election would be viewed as a bellwether for the eleven primary elections scheduled for "Super Tuesday" on March 10, 1992.

To counteract the Buchanan challenge in Georgia, Bush-Quayle '92 sought the endorsement of leaders that would appeal to the "Christian Evangelical voter," including Pat Robertson, who could influence a number of voters by virtue of his role as a television personality and his leadership of the Coalition. Robertson authorized Bush-Quayle '92 to send a February 27, 1992 letter over Robertson's signature expressly advocating Bush's election in the Georgia primary, which was less than a week away, and in the November general election. [\[FN32\]](#) The campaign paid for the production and distribution of the letter.

[FN32.](#) The letter stated in part:

The question that is burning in our hearts now is simple: "What should we do in the 1992 Georgia primary and general election to insure the long range triumph of our values?"

....

In my opinion, the best course for us is to negotiate with President Bush and his staff tangible, continuing support on our issues, then show the Democrats and the nation that the Republican party is unified and has no intentions of losing the White House in November.

For the good of America and the ultimate triumph of our issues, I have prayerfully decided to support George Bush now and in the general election in November. I hope that you will join me on March 3rd in the Georgia Primary.

FEC Ex. 003-1763.

***69** Bush-Quayle '92 paid the Coalition \$752.73 to rent the Georgia portion of the Coalition's "house file" mailing list for use in distributing the February 27 letter. This was one of the first, if not the first, times the Coalition rented its house file mailing list to an outside group.

In the February 27, 1992 advocacy letter, Robertson

left the capacity in which he signed ambiguous. He is neither explicitly identified as the head of the Coalition or the Christian Broadcasting Network, nor is it explicit that Robertson wrote only as a private citizen. A subsequent press release on Coalition letterhead stated:

Robertson endorsed the Bush/Quayle ticket in the Republican Party primaries. Through the Christian Coalition, a grassroots citizen activist organization with 250,000 members, Robertson has mobilized activists to turn out the largest Christian vote in American history.

FEC Ex. 037-0161.

On "Super Tuesday," Robertson faxed a letter written in his capacity as President of the Coalition on Coalition stationery to Chief of Staff Skinner referencing a previous conversation "just prior to my mailing the letter in support of President Bush to my supporters in Georgia," and responding to Skinner's request for "any names I had for your review in filling positions in the Administration." FEC Ex. 035-0069.

Within the next two weeks, Robertson and Reed met with White House Personnel Director Constance Homer and her assistant, Les Csorba. In preparation for the meeting Csorba sent Homer a memorandum stating:

I assume Pat wants the opportunity to meet you and discuss some personnel issues that are important to him, like the NEA and the FCC. Apparently he and Skinner struck a deal about his timely support for the President for some influence in the appointment process.

FEC Ex. 035-0246 & FEC Ex. 109 (Csorba Decl.) ¶ 9. Csorba cannot recall what was discussed at the meeting, and Robertson denied having reached an understanding with Skinner exchanging his endorsement for influence in the Administration's appointment process.

At the California Republican Convention, Robertson and Reed met with Charles Black, a senior advisor to the Bush campaign, to discuss possible ways to motivate religious conservatives to support candidate Bush. Shortly after the meeting, on April 3, 1992, Reed, as Executive Director of the Coalition, sent Black a letter suggesting 53 individuals as possible candidates to serve as California delegates to the 1992 national Republican Convention. Throughout the Spring and Summer of 1992, Robertson and Reed lobbied senior campaign officials to appoint Coalition members as Bush-Quayle '92 co-chairs in their respective states. E.g., FEC Ex. 023-0278; FEC Ex. 023-0270. Some letters in this regard were

written on Coalition stationery. The effort was quite successful. Bush-Quayle '92 appointed a number of the individuals suggested by Reed and Robertson as state co-chairs.

By April 1992, the Coalition's plans for its ambitious voter guide and "get out the vote" project were well formed, although the target total appeared to remain in flux. For example, in a letter to a grant applicant, Reed wrote:

As you are probably aware, Christian Coalition is planning to distribute 30 million Voter Guides in the churches in 1992, and make 2 million calls to Christians to get them out to the polls. The Voter Guides will cost me approximately 1 million dollars, beyond my general operating budget.

FEC Ex. 042-0032. Reed's notes from an April 28, 1992 meeting with the Coalition's Field Director, Guy Rodgers, indicate discussion of "40 million voter guides" and "2 *70 million ID'd voters" and "2 million phone calls/letters." FEC Ex. 065-0013. Also in April 1992, at Reed's suggestion, John Wheeler, editor of the Coalition's newspaper, wrote to President Bush and Vice President Quayle requesting an interview for use, among other things, in the Coalition's "25 million" voter guides. The Vice President granted an interview. On May 1, 1992, Reed traveled to Washington, D.C. at Coalition expense to meet with Mary Matalin, Bush-Quayle '92's political director. Reed's notes from the meeting include reference to "voter guides--40 million." See FEC Ex. 065-0016 & FEC Ex. 61 (Reed Dep.) at 392-93.

Throughout the presidential campaign, Reed and Robertson had frequent contact with Bush campaign officials. While Robertson had declined Bush-Quayle '92's offer of the chairmanship of a campaign steering committee, Reed served as co-chair of the campaign's "pro-family" steering committee, which had as one of its purposes to discuss what could be done to assist Bush-Quayle among "pro-family" voters. In June 1992, Reed flew to Washington, D.C. at the Coalition's expense, to attend a steering committee meeting.

Throughout the campaign, Reed provided Bush-Quayle '92 with strategic and other campaign-related advice. On June 2, 1992, the day of the California primary election, Robertson conducted a nationwide telephone poll of the audience of his "700 Club" television program asking them to express a presidential preference. That day, Reed sent a memorandum to Bush-Quayle '92 Chairman Teeter on Coalition stationery stating that the poll results were 57 percent for President Bush; 40 percent for

independent candidate Ross Perot; and three percent for then-Governor Clinton. Reed wrote:

Exit polls in 1988 showed Bush pulling 81% from these same voters. If he only gets 50-60%, he is gone.

We are ready and willing to help shore up this base. Now that we are past the primary season we need to come up with a strategy to rebuild bridges among these voters for the general. Hope to talk to you soon about what can be done--the sooner the better.

FEC Ex. 023-0368.

Campaign Chairman Teeter was aware that the Coalition intended to distribute millions of Coalition voter guides in churches nationwide and that the guides would show President Bush's support or opposition of issues to be more compatible with the views of the "Evangelical voter" than would be the positions shown for then-Governor Clinton. Teeter believed that the Coalition voter guides would have the effect of causing a greater number of voters to go to the polls and vote for the Bush-Quayle ticket than would have gone in the absence of the guides. Teeter testified that this was his general understanding, but he had no input into, or advance knowledge of, the specific issues that the Coalition selected for its 1992 presidential voter guide.

In the late Spring of 1992, the Coalition had communicated to the campaign that it would invite President Bush to address the Coalition's September 1992 Road to Victory conference to be held in Virginia Beach, Virginia. He was also invited at some point to attend a fundraising event in connection with the conference. Campaign official Robert Heckman prepared a June 3, 1992 memorandum entitled " 'Outside' Programs/Proposals" listing some outstanding invitations to the President. The first of these was:

Robertson/Christian Coalition

(involves 40 million voter guides, 2 million phone contacts for I.D./GOTV, building of master list)

Cost: Voter Guides--\$500,000

ID/GOTV calls--\$1,000,000

FEC Ex. 023-000449. [\[FN33\]](#) The official invitation was sent on June 9 and it references *71 the Coalition's intention to distribute "40 million non-partisan voter guides in churches prior to Election Day." FEC Ex. 023-0244. President Bush attended the conference and the fundraising event. Funds raised at the event were deposited into the Coalition's general treasury.

[FN33.](#) Attached to this memo was a second

page entitled "Potential Funding Mechanisms." The second item was "CC September Option" with handwritten notes "VA Beach FR (POTUS) could raise 500,000" "\$ could go to #1." The document was produced to the FEC by the Republican National Committee pursuant to subpoena, but the FEC was unable to find a witness that would claim authorship of the typewritten portion of the second page. The FEC draws the inference that the Bush campaign discussed President Bush (POTUS being the commonly used White House acronym for "President Of The United States") attending the Coalition's fundraiser and raising the \$500,000 necessary for the Coalition's voter guides. The FEC was unable to locate a witness to endorse or refute this interpretation.

In June 1992, Robertson and Reed contacted the campaign and the White House in parallel fashion. Robertson wrote to Bush Administration officials, including Education Secretary Lamar Alexander, urging the President to veto education-related legislation pending in Congress and to support a "G.I. Bill for Kids." Meanwhile, Reed sent another campaign advice memorandum to Teeter, Matalin, and Mimi Dawson arguing that the President had to take certain policy stands, to employ rhetoric more commonly associated with Vice President Quayle, and include conservative Christians in visible positions in the campaign and in the Administration. Matalin sent an internal memorandum to Dawson and Mary Lukens stating:

The essence of this plan is already underway: closer attention to evangelicals/rc's at White House / on trips; We have incorporated all but three of Ralph's people into our structures in the states; Lukens + Betteria are working to schedule the VA Beach trip.

As for rhetoric, every speech I hear, Bush does the Quayle rap. In any event, there's nothing in here we don't know or aren't working on. The VA Beach Trip and \$500,000 (ha ha) will help--
FEC Ex. 023-0535.

In July 1992, senior campaign officials traveled to Virginia Beach to meet with Robertson and Reed. Reed had prepared and distributed an agenda for the meeting that included discussion of "Voter Guide Printing and Distribution." FEC Ex. 023-000400. The witnesses who attended the meeting testified that they could not recall what was discussed at the meeting. However, Matalin's contemporaneous notes,

written on the back of a copy of Reed's agenda, indicate that the sixth item discussed was

Voter Guides--40 M guides

-- questionnaires out to cand.

100,000 churches

Christian ldrs send letter to denominations w/ tear off to order tree guides

-- phone tree per co.

FEC Ex. 023-000402; FEC Ex. 45 (Matalin Dep.) at 111-14.

On July 23, 1992, the week after the Virginia Beach meeting, Pat Robertson conducted a videotaped interview of President Bush in the Old Executive Office Building. The interview was for broadcast on Robertson's "700 Club" television program. The White House briefing memorandum to the President indicated that portions of the interview also would be used on the Coalition's 25 million voter guides to be distributed at 100,000 churches.

In a series of communications that departed from standard procedure at both the "700 Club" and the White House, the campaign, through Matalin, suggested to Robertson questions that might be asked in the interview. Similarly, the Coalition, through Reed, provided the White House with both suggested questions (which was common) and answers (which was not). Reed's memorandum states that:

***72 ALL THE ANSWERS ARE SIMPLY SUGGESTIONS. BUT THE LANGUAGE IN QUESTIONS 1,6, AND 8 IS VERY SPECIFIC TO THIS CONSTITUENCY. WE STRONGLY RECOMMEND NO MAJOR REVISIONS IN THIS LANGUAGE.**

FEC Ex. 030-0303. The interview took place, but it is unclear which, if any, of Reed's suggested answers President Bush adopted.

Contacts between the Coalition and the Bush campaign and the Bush Administration continued through the Autumn of 1992. In advance of the Republican National Convention, Reed was active in advocating that the Republican Party maintain its public opposition to abortion. Robertson was a delegate to the Republican National Convention, held in Houston, Texas. Robertson also gave a speech at the Convention. In September 1992, Vice President Quayle attended a number of Coalition-related fundraising events. On September 11, Bush addressed the Coalition's second Road to Victory conference.

In the Fall of 1992, James Baker, III, came to play a more prominent role in the Bush-Quayle campaign. Baker, who had been serving as the Secretary of

State, became White House Chief of Staff so as to have a greater hand in the dealings between the Bush Administration and Bush-Quayle '92. Baker was a member of the "Core Group" through which all major campaign-related decisions passed. In a brief meeting, Baker advised Robertson that in the final stage of the presidential campaign, President Bush would be focusing on economic issues and downplaying the social issues about which Robertson was most fervent. Baker also spoke of fishing with the President in Montana. Robertson considered Baker to be "disengaged."

In a subsequent telephone conversation, Robertson mentioned to Baker the Coalition's plans to distribute voter guides. Baker, an attorney with considerable campaign experience, sought legal advice from both the Office of White House Counsel and counsel for Bush-Quayle '92 as to whether he should take any further telephone calls from Robertson. Subsequently, Robertson left a telephone message at the White House to be forwarded to Baker, advising him that "[t]he Christian Coalition is distributing 1.3 million voter guides in North Carolina and 1.1 million guides in Georgia." FEC Ex. 0350-110.

On September 3, 1992, the Coalition sent candidate surveys to President Bush and Governor Clinton. The cover letter sought a response from the candidates by September 15. The letter warned "[s]hould you fail to respond, we will characterize your positions on the issues based on your public statements and policy record." FEC Ex. 034-0384. Bush-Quayle '92 sent a response on September 28, 1992. It appears the Clinton campaign did not reply. During a September Road to Victory training session, Reed explained that a survey was not sent to the Perot campaign even though Ross Perot was on the ballot in 35 states because Perot "is an asterisk in the national polls at this point." FEC Ex. 91 at 29. However, after discussion within the Coalition, a candidate survey was sent on October 2, 1992 to Ross Perot--who previously had withdrawn from, and then reentered, the campaign. The Perot campaign was given until October 5 to respond.

The Coalition had produced its first presidential voter guides by the September Road to Victory conference, prior to receiving President Bush's response to the candidate survey. At the September Road to Victory conference, the Coalition distributed a 16-page tabloid voter guide that included "candidate interviews" that were "simulated" by stringing together selected quotations from various sources and making them appear to be responses to questions posed by the Coalition. Endnotes

identified the source of the quotes. The "interview" of President Bush included six quotations from Bush's "700 Club" interview with Robertson. FEC Ex. 002-2059. *73 The guide also featured a one-page handbill guide listing twelve issues, and columns with the photographs of candidates Clinton and Bush, under which appear either the word "supports" or "opposes." FEC Ex. 002-2060. [\[FN34\]](#)

[FN34.](#) These were: (1) Balanced Budget Amendment; (2) Abortion on Demand; (3) Parental Choice in Education (Vouchers); (4) Voluntary School Prayer Amendment; (5) Homosexual Rights; (6) Raising Income Taxes; (7) Term Limits; (8) Death Penalty; (9) Increased Funding for SDI; (10) Line-Item Veto; (11) Tax-Funded Abortion; and (12) Condom Distribution in Schools. According to the guide, the candidates agreed on only two issues, supporting "death penalty" and "line-item veto."

The Coalition also used the one-page comparison in a bulletin insert voter guide. The Coalition produced 20,000 copies of the bulletin insert guide prior to the Road to Victory conference. In October, the Coalition produced a bulletin guide that included Perot and compared positions on the same twelve issues.

The Coalition produced and distributed nearly 40 million voter guides prior to the November 1992 election. The Coalition admits that it spent at least \$241,915.43 printing and distributing the guides, not including overhead or staff costs. The Coalition also disbursed \$23,000 to state affiliates for voter guide costs. The Coalition's financial records reflect disbursements of \$562,802.05 for "Voter Guide Mailing." This amount may include some portion for voter guides produced for state elections.

The Coalition also made expenditures on a "get out the vote" campaign. By May 1992, the Coalition "house file" contained more than 229,000 names. To prepare for the 1992 elections, the Coalition engaged in a "voter identification" effort to compile a separate list of those who would be subject to GOTV calls. Reed assured the state affiliates that the voter list would be kept separate and that the voter list would not be used for fundraising. The Coalition's voter identification list contained more than one million names. Coalition records reflect a total expenditures of \$1,203,446 and \$63,814 for "voter identification" and "get out the vote" activities in 1992. The

Coalition has not disaggregated this amount to reflect only that allocable to the 1992 presidential election.

B. Congressional Coordinated Expenditures

The FEC makes similar allegations of illegal "coordinated expenditures" in connection with: (1) Senator Jesse Helms' 1990 reelection campaign; (2) the 1992 congressional campaign of Republican candidate, Robert D. Inglis; (3) the 1994 senatorial campaign by Republican candidate Oliver North; and (4) the 1994 congressional campaign of Representative John David ("J.D.") Hayworth. As with the 1992 presidential election, the FEC admits that none of these communications contained "express advocacy," but the Commission argues that these communications were produced in conjunction with the candidates and should be treated as prohibited in-kind corporate contributions.

1. 1990 Helms for Senate Campaign

Jesse Helms, a Republican, was first elected to represent North Carolina in the United States Senate in 1972, winning approximately 54 percent of the votes cast. He was reelected in 1978 with 55 percent of the vote, and in 1984 with approximately 52 percent of the vote. In the November 1990 general election, Senator Helms' Democratic challenger was the former mayor of Charlotte, North Carolina, Harvey B. Gantt.

The Coalition viewed Senator Helms as a staunch ally in Congress. *See, e.g.*, FEC Ex. 001-1667. In January 1990, Robertson sent Senator Helms a short letter on personal stationery indicating that "I would personally be delighted to be of any assistance that is needed when the campaign gets underway." FEC Ex. 043-0149. On May 30, 1990, Robertson received a letter from Helms discussing the possibility that Robertson would sign a *74 fundraising letter drafted by the Helms for Senate campaign urging recipients to contribute to the Helms for Senate campaign and to contribute to the Coalition. On June 14, 1990, after having sought and received Reed's comment, Robertson authorized Helms for Senate to use his signature on the letter, which was mailed on or about July 30, 1990. Additional mailings went out in August 1990. Helms for Senate paid for these mailings.

At Reed's direction, the Coalition decided no later than September 1990 to expend corporate funds to produce a "voter guide" in North Carolina comparing the views of Senator Helms and Harvey Gantt on select issues, as characterized by the Coalition. The

Coalition distributed voter guides for the 1990 general senatorial election in only six or seven states. The Coalition's point person for the North Carolina voter guide was Judith Haynes, Southeastern Regional Field Director. Haynes reported directly to Reed. In September 1990, Haynes sent questionnaires to both candidates at the same time and in the same manner. The questionnaire posed 20 questions in general terms asking the candidate to indicate whether he supports or opposes prospective legislative action on certain issues and providing three lines to explain the response. *See* FEC Ex. 001-0151. It appears as if the questionnaire was written independently by Coalition staff and that neither Senator Helms or his campaign staff suggested, nor had advance notice of, the issues included in the questionnaire.

Haynes was responsible for making follow-up telephone calls to secure a response from the candidates to the Coalition's questionnaire. On deposition, Haynes testified that she telephoned Gantt's campaign office on a number of occasions. On the day of the printing deadline, she was informed that Gantt would not be responding. Haynes contacted Senator Helms' staff "a couple of times" to find out if there would be a response. Reed also called senior staff at Helms for Senate. On October 11, 1990, a member of the Helms for Senate staff faxed the Senator's responses to Haynes.

Also on October 11, the Coalition sent a check for \$5,775 to the North Carolina Christian Coalition for printing and distribution of the North Carolina voter guide. The only federal election covered by the guide was the Helms-Gantt senatorial election. In a single page, the guide, entitled "REPORT CARD On Moral and Traditional Family Issues" compared the responses of the candidates to 18 of the 20 issues contained in the questionnaire; Gantt's responses were listed as "Did Not Respond" and Helms' responses were either "Supports" or "Opposes." The Coalition began shipping the voter guides on October 23, 1990 for ultimate distribution at churches on Sunday, November 4, 1990. In a telephone call thanking Helms for responding to the questionnaire, Robertson advised Helms in advance of the November 4 distribution date. The Coalition, through its North Carolina affiliate, distributed at least 750,000 voter guides prior to the November 1990 election.

In October 1990, Reed may have been advised of the results of internal polls conducted by Helms for Senate showing Senator Helms trailing Gantt. Published polls around the same time also showed

Senator Helms trailing Gantt.

The Coalition also provided its North Carolina affiliate with a \$14,000 grant, made from general treasury funds, for a get-out-the-vote ("GOTV") telemarketing campaign. The Coalition identified those individuals to be called. The North Carolina Christian Coalition contracted with National Telemarketing Services, a Lynchburg, Virginia firm, to conduct the calls. North Carolina was the only state in which the Coalition provided funds for GOTV calls in 1990.

Senator Helms was reelected in 1990 with approximately 53 percent of the vote.

2. Inglis for Congress Committee

The Coalition spent an indeterminate amount to print and distribute approximately *75 200,000 voter guides shortly before the 1992 general congressional election in the Fourth District of South Carolina. The FEC alleges that this expenditure was an in-kind contribution to the Republican challenger, Robert D. Inglis, who defeated the Democratic incumbent, Elizabeth Patterson. The principal basis for the allegation is that the Coalition staff member closely involved in the voter guide production and distribution, Mr. Beverly Russell, also was centrally involved in the Inglis campaign.

Russell was the Fourth District Congressional District Coordinator for the South Carolina Christian Coalition in 1991 and 1992, chair of the Union County Christian Coalition chapter, and a member of the South Carolina Christian Coalition statewide Advisory Board. At that time, Russell also held positions in the Republican Party of South Carolina.

In 1991, Russell was invited to a strategy session among Republican Party members, convened by Inglis, to discuss possible candidates and strategies to oppose Patterson in the 1992 congressional election. Also present was Barry Wynn, chairman of the South Carolina Republican Party. After meeting with potential voters in early to mid-1991, Inglis filed a statement of candidacy on August 28, 1991. Russell was a volunteer member of the Inglis for Congress campaign

Among other activities, Russell arranged for and signed a contract for radio time on behalf of the Inglis campaign, and delivered the radio advertisement tape to the radio station in Union to be aired during the campaign. Russell arranged a meeting between Inglis and Republican precinct

representatives in Union County. Russell attended a meeting of the 1992 Inglis campaign's paid and volunteer staff, at which Professor Woodard of Clemson University presented an analysis of precinct voting patterns "targeting precincts that would more likely go the Republican way" based on research conducted for the Inglis campaign. At that meeting, the Inglis campaign's plans and strategies were discussed.

While Russell held positions with South Carolina Christian Coalition, he had knowledge or information regarding the plans and strategies of the Inglis campaign. Inglis' 1992 campaign focused on congressional reform, with particular emphasis on two issues: Inglis' self-imposed limit of three terms in the House of Representatives, and his decision not to accept any contributions from PACs. Russell knew that Inglis had made a strategic decision not to make abortion a prominent issue in his campaign, because Inglis' anti-abortion position would hurt him in the general election. Russell testified that "the main thing was, Bob Inglis would vote right, you know, on the issues. It is just that he was not going to shoot himself in the foot and get unelected by promoting it in the general election." FEC Ex. 71 at 139-142.

Prior to the 1992 election, Russell conducted a voter identification project in Union County, South Carolina for Christian Coalition with the intention of identifying voters sympathetic to Christian Coalition's issues.

By letter dated June 30, 1992, Guy Rodgers, Christian Coalition National Field Director, sent Inglis a seven-page "Christian Coalition 1992 Issues Survey: Federal Candidates," which Rodgers stated had been "mailed to every candidate for federal office in the United States." The 1992 survey was written by Rodgers and Reed over the course of a few months in early 1992. The survey was not written in coordination with the Inglis campaign. Inglis cannot recall personally completing the form, but a completed form was returned to the Coalition. Having read news accounts of the upcoming Coalition voter guides, Inglis called Russell to learn how his positions were presented in the voter guide. Russell read the issues and candidate positions to Inglis over the telephone, and Inglis confirmed that the guide accurately *76 stated his positions on the six issues chosen to be included in the Fourth District guide. [FN35] No evidence in the record indicates that Russell was involved in the selection of the six issues to be included in the Fourth District guide, each of which also was included in the guide for the 1992 senatorial election in South Carolina. See FEC

Ex. 044-001456.

[FN35](#). The guide lists the six issues as: (1) Raising Income Taxes; (2) Abortion on Demand; (3) Choice in Education (Vouchers); (4) Homosexual Rights; (5) Tax-Funded Obscene Art; (6) Balanced Budget Amendment. FEC Ex. 044-001456.

Russell distributed Christian Coalition's 1992 voter guides to churches in Union County. The voter guides were distributed at churches on the Sunday before election day. The South Carolina Christian Coalition also paid to put a copy of the voter guide in the *Greenville News*, a paper that circulated throughout most of the Fourth District. Russell distributed Christian Coalition's 1992 voter guide in newspaper delivery boxes the night before the election, and also distributed copies of campaign literature for Republican candidates that he had "on hand," including literature from the Inglis campaign.

3. North for Senate

In 1994, Oliver North campaigned to represent Virginia in the United States Senate. He faced opposition in a primary election, but won the Republican nomination in June 1994. North lost the general election in November 1994 to the Democratic incumbent, Senator Charles Robb. Pat Robertson and Ralph Reed, as well as other Coalition staff had close ties to the North campaign. [\[FN36\]](#) The Coalition was active in relation to the 1994 senatorial election in Virginia, conducting a get-out-the-vote campaign, distributing voter guides to churches, and sending postcard voter guides by mail. The FEC alleges that the Coalition spent \$144,262.72 on these efforts--the actual amount spent is unclear--and that these expenditures were illegal in-kind contributions to the North campaign.

[FN36](#). Among other ties, Robertson's daughter-in-law was the North campaign's Regional Field Director for Virginia Beach, Virginia area.

Prior to the 1994 campaign, North had a number of ties to the Coalition. Robertson and North had traveled in similar circles since the 1980s. North addressed the Coalition's Road to Victory conference on many occasions, including in 1992 and 1993. According to North, he and Robertson share similar

values and perspectives on the country. Reed first met North in May 1990, at a Coalition event in Arlington, Virginia. Prior to North's senatorial candidacy, his syndicated newspaper column was carried in the Coalition's newspaper, *Christian American*. In January 1994, Charles ("Chuck") Cunningham, a friend of North's from their mutual association with the National Rifle Association, became the Coalition's Voter Education Director.

In December 1992, Robertson attended a meeting in Williamsburg, Virginia to discuss North's political future. In March 1993, Reed joined an Advisory Board to assist North in his decision whether to run for Senate. Later in the Spring of 1993, North's opponent for the Republican nomination, James Miller, approached Reed and learned that Robertson and Reed intended to support North.

Other ties between the Coalition and the North campaign included David Hummel, who was both a member of the Virginia Christian Coalition's Board of Directors and the chairman of the North campaign in Virginia Beach, Virginia. With respect to at least one campaign-related letter from Hummel to North, Hummel indicated that a blind copy should go to Ralph Reed. North's political director, Thomas Bunnell, had a general sense that the Coalition was supporting North's campaign.

***77** Demonstrating that support, shortly before the 1994 Republican state convention the Coalition shared a delegate list from the 1993 Republican Convention in Virginia with the North campaign. Of the more than 13,000 delegates that had attended the 1993 convention, 2,910 households had registered support for the Coalition's preferred candidate, Mike Farris, for Lieutenant Governor [hereafter "Farris list"]. By cross-checking, the Coalition had determined that 780 of the Farris supporters were in the Coalition's "house file," its database and mailing list. The Coalition did not make the Farris list publicly available. The Farris list would be valuable to a campaign because those on the list were highly likely to share the Coalition's views on a number of issues, including abortion, and many of the 1993 delegates would likely be delegates to the 1994 Virginia Republican convention.

Reed directed Coalition staff member, Joel Vaughan, to give a copy of the Farris list to the North campaign through an activist or volunteer. Vaughan cannot recall why, but it was his impression that it would have been improper to give the list directly to the campaign or to make explicit how the list might be used by the campaign. In February 1994, at the

Virginia Republican party's meeting in Norfolk, Virginia, Vaughan looked in vain for a North volunteer or activist that he thought could be entrusted with the list. [\[FN37\]](#) Near the end of the day, Vaughan gave the list to Joe Elton, a paid consultant to the North campaign. Elton wanted to know what the list was. Vaughan's reply was vague, prompting Elton to again press for clarification, Vaughan may have explicitly mentioned the connection to Farris, and he recalls explaining to Elton that the Coalition thought Elton would be interested in the inch-thick list of "pro-life" people. *See* FEC Ex. 78 at 577-86.

[FN37.](#) Vaughan sought a person "who I could have told what the list was, without telling them specifically what to do with it. But who would have known what I, what a good thing to do with it would have been." FEC Ex. 78 at 582.

Vaughan was unsure whether his giving the list to Elton had been legal. He sought guidance from Reed, who stated that by giving the list to a North campaign consultant, he had not actually given the list to the campaign.

Pat Robertson also signed a fundraising letter for the North campaign. The North campaign rented the Coalition's mailing list, and the Robertson letter was sent to those on that list. The North campaign paid \$140 per 1,000 names on the Coalition's list. The letter requests that the recipient both contribute to the North campaign and volunteer to be a North delegate to the 1994 Virginia state Republican convention. Reply cards were coded to identify which list the respondent had been on. The Coalition rented its Virginia list to only one other federal candidate, the Republican candidate for the Fourth Congressional District of Virginia.

Delegate selection for the 1994 Virginia state Republican convention took place in the first quarter of 1994 through a series of mass meetings and conventions in the State's 134 political units. The North campaign treated its list of delegates as confidential. Thomas Bunnell, political director for the North campaign, and Cunningham, head of the Coalition's "voter education" effort, would call each other when they received information regarding the political unit mass meetings and would exchange information. The Coalition was active in informing its members about the time and place of the meetings. The North campaign, through Bunnell, actively

sought out Coalition members to participate in the meetings. Bunnell shared information from the campaign's database concerning the time and place of delegate meetings as well as relevant North campaign contact people for each meeting. During the delegate selection period, Bunnell and Cunningham spoke once or twice a day.

***78** Cunningham drafted the text of mass mailings to go to those on the Coalition's mailing list, informing them of the time and place for delegate selection and urging their attendance. The Coalition made telephone calls from its internal phone bank to convey the same information. After delegates were selected, the Coalition contacted delegates that were Coalition supporters to determine whether they intended to support North or Miller at the state convention. Reed testified that the results of this poll were not shared with anyone.

The North campaign also conducted its own internal poll of all delegates. As the results were being tabulated, the poll was kept confidential by the campaign. The results were not made public until it became clear that North was the favorite to win the nomination. While Bunnell does not specifically recall sharing the results with Cunningham prior to public dissemination, he considered it likely that he did because he "was spinning various centers of influence in Virginia about how successful and how we were doing." FEC Ex. 6 at 96.

In July 1994, after North had won the Republican nomination to stand for Senate in the 1994 general election, Robertson hosted an informal meeting at his home in Hot Springs, Virginia to discuss negative media portrayal of Christian conservatives and to discuss means to encourage "Christian voters" to go to the polls in November. Invitations were prepared by Coalition staff. The meeting was held on a Thursday and Friday during working hours. Certain Coalition staff attended as part of their work duties. Also in attendance were members of the Republican Party of Virginia and a representative of the North campaign.

In advance of the November 1994 general election, the Coalition prepared voter guides in Virginia. Three candidates stood for election to the Senate: Senator Robb (Democrat), Oliver North (Republican), and Marshall Coleman (Independent). The Coalition produced six versions of its voter guide for Virginia. Each version contained the Senate guide on one page. The Senate guide provided responses, or partial responses, from each candidate. A separate version of the Senate guide was produced

for distribution in Catholic churches. This version was designated as "Christian Coalition & League of Catholic Voters 1994 Voter Guide." See FEC Ex. 003-3133. In all, the Coalition produced approximately 1,750,000 voter guides in Virginia. Because the Coalition is headquartered in the state, Coalition staff had a more direct role in voter guide distribution than was the case in other states.

The record is unclear as to when candidate questionnaires for the Virginia guides were sent and how those questionnaires were drafted. It is undisputed that Cunningham made the initial selection of which issues were included in the Virginia guides, and it is likely that Reed approved his selection. See FEC Ex. 16 at 400 ("Ralph signed off on most of the different versions of voter guides that year, since it was my first year."). There is no evidence that Reed redesigned any of the Virginia guides.

In the North campaign's Chantilly, Virginia office, North's political director, Bunnell, sat in close proximity to the campaign manager, Timothy Carpenter. Carpenter would frequently update Bunnell on campaign-related news. From Carpenter's reports, Bunnell understood that Carpenter spoke with Reed in October 1994 about the Coalition's voter guides. Bunnell testified that the tenor of Carpenter's comments was that the Coalition's guides would be helpful to the North campaign. From Carpenter's comments, Bunnell inferred that Carpenter and Reed had discussed which issues should be placed on the Coalition's voter guides to aid the North campaign. See FEC Ex. 6 at 65. Bunnell also testified that he personally had discussions with people about what would be on the Coalition's Virginia voter guide in advance *79 of its release. See *id.* at 121-22. However, Carpenter testified that he did not even know the Coalition would produce a guide until it was formally distributed, and that he was not contacted by the Coalition concerning where distribution of the guides would be most helpful to the North campaign. See CC Ex. 69 at 88-90.

Carpenter characterized the North campaign's informal reaction to the Coalition's Senate voter guide as follows:

In some audiences it would be very good and in other audiences, who had strong feelings opposite of the Christian Coalition, it could be very damaging. So you hope that it went to the right group.

FEC Ex. 11 at 89.

It appears that the Coalition selected which churches received its voter guides. In addition, Cunningham decided to mail postcard voter guides in Virginia. These were mailed to the Coalition's "donor" list.

In 1994, the Coalition hired the same telemarketing company that the North campaign used to conduct GOTV calls for the general election in Virginia, Georgia, and Florida. A memorandum from the company indicates that the Coalition paid a total of \$136,606.41 for these calls. The postcard voter guides cost \$1,210.89, and the handbill voter guides cost \$1,313.98.

4. Hayworth for Congress

In 1994, John David ("J.D.") Hayworth campaigned as a Republican to represent the Sixth District of Arizona in the United States House of Representatives. Hayworth had been a television sports reporter and news anchor in Phoenix. Hayworth faced four opponents in the primary election, held on September 13, 1994, and Hayworth won. The general election was held on November 8, 1994, and Hayworth was elected with 55 percent of the vote. As with the Inglis campaign, the FEC's allegation is that a Coalition staff member who also was a volunteer in Hayworth's campaign, used inside information about the campaign's needs to guide the Coalition's expenditures on voter guides. The FEC alleges that the Coalition spent \$8,457, while the Coalition argues that the FEC can only prove expenditures of \$2,449.91.

The FEC's allegation centers on the activities of Tom Grabinski. Grabinski met Hayworth in 1988 or 1989 through the Rotary Club in downtown Phoenix, Arizona. The two also met from time to time at events sponsored by Southern Baptist churches. For some time, Grabinski had urged Hayworth to run for Congress. In 1992, Grabinski became a Republican Party precinct committeeman. In early 1993, Hayworth invited Grabinski to a meeting to discuss fundraising for Hayworth's contemplated congressional campaign. In March 1993, Grabinski hosted a "meet and greet" gathering at his house for friends and associates to meet Hayworth. In October or November 1993, Grabinski was recruited to join the Hayworth campaign's finance committee.

In March 1994, Grabinski was recruited by then-Coalition Field Director, Guy Rodgers, to be the chairman of the Arizona Christian Coalition, which was formally incorporated in June 1994. Grabinski did not discuss his new role with the Coalition in much detail with Hayworth. However, Grabinski

was instrumental in identifying other Southern Baptist churches in the state where Hayworth might worship when he was away from the Phoenix area on a Sunday.

Another connection between the Hayworth campaign and the Coalition was the friendship between Hayworth's campaign manager, Scott Hildebrand. Hildebrand had known Chuck Cunningham, the Coalition's Director of Voter Education, since 1982, when they worked together. During the 1994 campaign, Hildebrand and Cunningham would discuss the general tenor of the campaign and politics in general.

In the summer of 1994, the Coalition sent the Hayworth campaign a questionnaire for use in preparing a voter guide. *80 Fifty-two questions were asked. The Coalition's 1994 Primary Voter Guide listed ten issues and the responses of the five candidates.

For the general election, the Coalition prepared a handbill voter guide comparing the positions of Hayworth and the Democratic incumbent, Karen English, on six issues. [\[FN38\]](#) From Coalition documents, as of three weeks prior to the election, it appears the Coalition planned to send 200,000 voter guides to the Sixth District and about 150,000 guides to other congressional districts in Arizona. Grabinski was largely responsible for identifying churches where the guides could be distributed and for recruiting individuals to distribute the guides to the churches. No record evidence demonstrates that Grabinski discussed his selection of distribution points or personnel with the Hayworth campaign. The actual number of guides distributed may have been somewhat more or less than planned.

[FN38.](#) These were: (1) Raising Federal Income Taxes; (2) Balanced Budget Amendment; (3) Taxpayer Funding of Abortion; (4) Parental Choice in Education (Vouchers); (5) Homosexuals in the Military; and (6) Banning Ownership of Legal Firearms.

The Coalition also reduced the guide to postcard size for mailing to individuals. This was an idea Cunningham brought to the Coalition from his experience with the National Rifle Association. As the Coalition's Director of Voter Education, Cunningham alone decided which elections would have both handbill voter guides and postcard guides.

Cunningham testified that he selected which elections deserved postcard guides as follows:

Well, a lot of it was a budgetary decision. We couldn't afford to do all the races because the postage is enormous. But it was where there was a high voter interest and it was important that religious conservatives participate. And we were educating them about the positions of the candidates on issues.

FEC Ex. 16 at 411-12. From Cunningham's review of Coalition documents, it appears that more than 12,000 postcard guides were sent to the Sixth District. *See* FEC Ex. 17 at 464-66. Hildebrand, Hayworth's campaign manager, testified that "Cunningham may have told me how many [voter] guides [the Coalition] would mail into the district, but no requests for information came from us and no advice issued from us." FEC Ex. 109 (Hildebrand Decl.) ¶ 16. [\[FN39\]](#)

[FN39.](#) The Coalition raises another frivolous hearsay objection to the introduction of this testimony. Cunningham's statements are party admissions, admissible through Hildebrand's testimony.

In addition to sending two types of voter guides, the Coalition hired a telemarketing firm, also used by the Hayworth campaign, to conduct a GOTV campaign in the Sixth District. Cunningham wrote the script used for the GOTV campaign.

The Coalition also placed a paid "fieldman" in the Sixth District. A "fieldman's" function was "to help our local chapter chairman recruit church liaisons and expand the potential distribution of the voter guide." Cunningham testified that the decision of where to place a fieldman was based on similar considerations as those determining where postcard guides would be sent.

According to the FEC, the Coalition spent at least \$8,374.41 on the primary and general election in Arizona's Sixth Congressional District.

C. Coordinated Expenditures with the NRSC in 1990

The National Republican Senatorial Committee ("NRSC") was and is the national party committee dedicated to the election of Republican party candidates to the United States Senate. In 1990, the NRSC had a Director of Coalition Outreach, Curt Anderson, who was responsible for maintaining

contact with non-party groups thought by the NRSC to have a *81 "natural affinity" for its Republican senatorial candidates. NRSC's sole motive for getting involved with such groups was to elect Republican Senators; to energize the groups' members to vote at the 1990 general election. See FEC Ex. 72 (Shelby Dep.) at 43, 50. In this regard, in June 1990 the NRSC sought a meeting with Robertson and Reed "for the purpose of discussing coalition development in our key 1990 senate races." See FEC Ex. 043-0132.

On August 16, 1990, Robertson and Reed met with NRSC's Anderson and its political director, Richard Shelby. Shelby and Anderson briefed Reed and Robertson on the senatorial elections that NRSC considered "key," and asked whether the Coalition would be conducting voter education during the 1990 election cycle. Reed informed them that the Coalition aimed to distribute five to ten million voter guides in as many states as they could arrange for them to be distributed.

At the close of the meeting, Shelby suggested that NRSC make a contribution to the Coalition to support its voter guide project, underscoring that NRSC could neither direct the nature of the activities or the places at which they occurred. See FEC Ex. 57 (Reed Dep.) at 136. Robertson or Reed responded that the Coalition would accept such a contribution.

In a follow-up telephone conversation between Shelby, Anderson and Reed, Anderson explained that it could not make its contribution to the Coalition contingent on the voter guides being distributed in certain states or races. Reed responded "Absolutely" going on to say that the Coalition intended to distribute voter guides with or without the contribution and that guides would be distributed in states in which the NRSC was interested as well as those in which it was not.

The Coalition proceeded with its voter guide program. On September 14, 1992, the Coalition sent its Florida affiliate a check for \$2,000 to cover the costs of voter guide printing and distribution. On October 2, 1990, the NRSC sent the Coalition a check for \$50,000. It was the largest contribution the Coalition had received to date. On October 11, 1992, the Coalition sent checks to its affiliates in Florida (\$10,000); Iowa/Nebraska (\$7,200); North Carolina (\$5,775); and Michigan (\$1,000) to cover voter guide costs. On October 23, 1992, the Coalition sent a check for \$3,600 to its Kentucky affiliate for voter guide costs. On October 24,

NRSC sent the Coalition two more checks, for \$10,000 and \$4,000, respectively. Within the week, the Coalition made additional voter guide disbursements to affiliates in Michigan (\$1,000) and Montana (\$2,000), and \$14,000 to the North Carolina affiliate for GOTV calls.

VI. DISCUSSION OF CORPORATE COORDINATED EXPENDITURES UNDER THE FECA

Section 441 b(a) prohibits corporations and labor unions from making any "contribution or expenditure in connection with any [federal] election." Although the terms "contribution" and "expenditure" are separately defined in the FECA's general definition section, see [2 U.S.C. § 431\(8\), \(9\)](#), the joint term "contribution or expenditure" also is defined in [§ 441b\(b\)\(2\)](#). The *MCFL* Court interpreted these statutory definitions to have broad coverage but with respect to "expenditures in connection with" a federal election made by a corporation independent of any campaign, the First Amendment limits the Act's coverage to expenditures for "express advocacy." At issue between the parties is whether corporate expenditures "in connection with" a federal election that have been discussed with, coordinated with, or approved by a campaign are within the Act's coverage, and if they are, whether the First Amendment requires the Act be pared back to protect such expenditures.

A. Preliminaries

1. Statutory Interpretation

The parties recognize that this Court need only reach the constitutional issues if *82 it is first determined that the Coalition's above-described expenditures on voter guides and get-out-the-vote activities fall within the statutory prohibition of [§ 441b](#). The FEC interprets § 441 b to cover the Coalition's "coordinated expenditures" as prohibited "contributions" within the meaning of the Act.

In the normal administrative law case, the Court would be obliged to accept this as an accurate statement of the law so long as (1) Congress has not "directly spoken to the precise question at issue," and (2) the FEC's interpretation "is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 161-62 (D.C.Cir.1986). Indeed, the Supreme Court has stated that the FEC is "precisely the type of

agency to which deference should presumptively be afforded." Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); Common Cause v. Federal Election Comm'n, 842 F.2d 436, 452 (D.C.Cir.1988). However, in a case such as this, the scope of Chevron deference is curtailed. [FN40]

[FN40]. The two leading rationales for Chevron deference are: (1) that the agency's superior technical expertise in the relevant field makes it better able to give the statute the effect intended by Congress; and (2) that because interpretation of ambiguous statutory terms always involves considerations of statutory policy, it is democracy-enhancing to have such policy choices be made by agencies, which are more accountable to the democratic majority than the unelected federal judiciary. E.g., Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C.Cir.), *aff'd by an equally divided Court*, 493 U.S. 38, 110 S.Ct. 398, 107 L.Ed.2d 277 (1989).

However, when ambiguous statutory terms are subject to an interpretation that would chill speech protected by the First Amendment, the foundation for Chevron deference is weakened. Article III of the Constitution establishes an unelected, life-tenured federal judiciary to provide the interpretive independence necessary to safeguard those precious liberties enshrined in the federal Constitution against encroachment by the elected branches acting at the behest of the popular majority at any given time. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-60, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). For this reason, the FEC's interpretation of the FECA is presumptively entitled to Chevron deference so long as its statutory interpretation does not run afoul of the First Amendment, as interpreted by the federal courts. See Chamber of Commerce v. Federal Election Comm'n, 76 F.3d 1234, 1235 (D.C.Cir.1996).

The Act's overlapping definitions of contributions and expenditures in § 441b(b) and § 431(8),(9) create some surface ambiguity concerning whether a disbursement must be to the candidate, directly or indirectly, or whether it must only be "in connection

with" a federal election. See MCFL, 479 U.S. at 245-46 & n. 3, 107 S.Ct. 616. Acknowledging this ambiguity, the MCFL Court, using the ordinary tools of statutory construction, canvassed the legislative history and determined that Congress plainly intended the Act to reach corporate expenditures in connection with a federal election. See *id.* at 248, 107 S.Ct. 616. Under that construction, it is manifest that the Coalition's expenditures on voter guides fall within Congress's intended scope for § 441b. See also 2 U.S.C. § 441a(a)(7)(B) (treating coordinated expenditures as contributions for individuals, PACs and political parties). Even if the statute were ambiguous, triggering Chevron deference to the FEC's interpretation, the FEC also interprets the Act to reach this result.

2. Prior Interpretation Defense

The Coalition argues that even if § 441b can be plausibly construed to cover corporate coordinated expenditures on voter guides, the FEC has previously given the Act a narrower construction and cannot change its enforcement position without notice to the regulated community and an opportunity to be heard. Specifically, the Coalition argues that the FEC has only pursued corporate coordinated expenditures *83 for express advocacy. For this proposition, the Coalition relies extensively on Orloski v. Federal Election Comm'n, 795 F.2d 156 (D.C.Cir.1986). [FN41]

[FN41]. In Orloski, an incumbent congressman who had been criticized as insensitive to the needs of senior citizens held a picnic shortly before the general election to meet with members of a senior citizen group. Three corporations collectively provided "in excess of one thousand hamburgers, an unknown quantity of potato salad and bus transportation." 795 F.2d at 165 (internal quotations omitted). At issue was whether these corporate donations were prohibited "contributions" to or "expenditures" related to the congressman's reelection campaign. Under the statute, these donations would qualify as contributions if made "for the purposes of influencing any election" or "in connection with any elections." *Id.* at 163.

With regard to public gatherings attended by an incumbent Member of Congress during campaign season, the FEC interpreted the Act to presume that the event was related to legislative rather than campaign activity

unless "someone at the funded event expressly advocates the reelection of the incumbent or the defeat of an opponent or solicits or accepts money to support the incumbent's reelection." *Id.*

The FEC's position in *Orloski* is unrelated to the coordinated expenditures at issue in this case. *Orloski* involved a challenge to the FEC's limited use of an "express advocacy" standard, applicable "only to corporate funding of legislative events sponsored by a congressman," 795 F.2d at 165. Moreover, the Commission's "express advocacy" limitation was so narrow as to be arguably "at the outer bounds of permissible choice." *Id.* at 167.

The FEC has not ambushed the Coalition in this case. As is discussed more fully in a moment, *Buckley* established that "coordinated expenditures are treated as contributions rather than expenditures under the Act," 424 U.S. at 46, 96 S.Ct. 612, and the Court "has consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-60, 107 S.Ct. 616 (citations omitted). Contrary to the characterization of the Coalition and amici, the FEC hardly invented the "coordination theory" on its own. [FN42]

[FN42] Indeed, the very authority on which the Coalition relies does not support its due process argument. For example, in *MCFL* the FEC took the position that § 441b's limit on independent expenditures was not limited by the "express advocacy" standard. See *MCFL*, 479 U.S. at 249, 107 S.Ct. 616. Given § 441b's vintage, it is not surprising that "[i]n the context of corporate contributions or expenditures, the FEC historically was unwilling to limit its enforcement activities to express advocacy of the election or defeat of a particular candidate or candidates." *Maine Right to Life Comm., Inc. v. Federal Election Comm'n*, 914 F.Supp. 8, 9 (D.Me.), *aff'd mem.*, 98 F.3d 1 (1st Cir.1996). See also *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 617, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (plurality); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985); FEC Advisory Opinion 1988-22 [1976-1990

Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5932 (1988).

B. Standard for Corporate "Expressive Coordinated Expenditures"

1. Constitutional Origin of "Coordinated Expenditures"

With one exception not directly at issue here, the FECA does not speak in terms of "coordinated expenditures." It contemplates that there will be campaign "contributions" and campaign-related "expenditures." Congress intended to place limits equally on both contributions and expenditures, as § 441b explicitly does. However, *Buckley* and its progeny have reaffirmed the profound constitutional difference between campaign contributions and independent expenditures. [FN43] E.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351 n. 14, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). But see *NCPAC*, 470 U.S. at 518-19, 105 S.Ct. 1459 (Marshall, J., dissenting) *84 ("Although I joined the portion of the *Buckley* per curiam that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance.").

[FN43] Originally, the Act also did not speak of "independent expenditures" until Congress introduced that term in the wake of *Buckley*. See 2 U.S.C. § 431(17).

But the distinction was recognized to be problematic from the moment it was announced. The central premise of *Buckley*'s upholding dollar limits on campaign contributions was that these limits placed only a marginal burden on political speech:

A contribution serves as a general expression of support for the candidate and his views, *but does not communicate the underlying basis for the support* A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution *but does not in any way infringe the contributor's freedom to discuss candidates and issues*. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate *involves speech by someone other than the contributor*.

Id. at 21, 96 S.Ct. 612 (emphasis added). By contrast, limits on expenditures heavily burden core First Amendment expression. For the ... right to speak one's mind on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.
Id. at 47-48, 96 S.Ct. 612 (quotations, citations and footnote omitted).

In accord with this neat distinction between hardly-expressive-contributions and very-expressive-expenditures, the Court has allowed Congress and the FEC wide berth to promulgate "prophylactic" rules limiting contributions, so long as these rules are directly related to the Government's compelling interest in preventing the appearance of corruption flowing from large campaign contributions. By contrast, the Court has progressively struck down or severely curtailed the Act's limitations on independent expenditures as failing to show a close enough nexus to the Government's compelling interest. *E.g.*, Colorado Republican, 518 U.S. at 618, 116 S.Ct. 2309 (Breyer, J., for the plurality) (striking limits on political party independent expenditures); id. at 631, 116 S.Ct. 2309 (Kennedy, J., concurring in the judgment) (same); MCFL, 479 U.S. at 249, 107 S.Ct. 616 (limiting corporate independent expenditure provision to "express advocacy"); NCPAC, 470 U.S. at 500-01, 105 S.Ct. 1459 (striking limits on PAC independent expenditures); Buckley, 424 U.S. at 47-48, 96 S.Ct. 612 (striking limits on independent expenditures by individuals).

While on the facts of many of these cases, the Supreme Court has been able to maintain a clean doctrinal division between contributions and expenditures, a separate analytical step by Buckley made clear that the distinction could be easily blurred. Responding to those opposing the contribution/expenditure distinction, the Buckley, Court reassured:

The parties defending [the cap on expenditures by individuals] contend that [the cap] is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities.... Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s

contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, *85 § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign.
Id. at 46-47, 96 S.Ct. 612 (footnote omitted) (emphasis added). Thus, Buckley introduced the notion of "coordinated expenditures" and held that for constitutional purposes such expenditures had the status of contributions. See Colorado Republican, 518 U.S. at 617, 116 S.Ct. 2309 (plurality) ("the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure."). [FN44]

[FN44. Most respectfully, a more straightforward understanding of Buckley's treatment of coordinated expenditures is that the First Amendment required most *independent* election-related expenditures to be carved out from the FECA's broad coverage, leaving only expenditures for "express advocacy" by corporations and unions within the Act's scope. Yet that constitutional carve-out left the Act's expenditure limitations intact with respect to coordinated expenditures. Thus consistent with congressional intent, the Act's "expenditure" limits rather than "contribution" limits would apply to coordinated expenditures. However, tracking the quoted portion of Buckley, Congress enacted 2 U.S.C. § 441 a(a)(7)(b), which treats coordinated expenditures as contributions.

Having previously narrowly defined the First Amendment interest at stake with contribution limits, Buckley, in its treatment of coordinated expenditures as in-kind contributions, left undiscussed the First Amendment concerns that arise with respect to "expressive coordinated expenditures." [FN45] An example of such an expenditure would be for a television advertisement favorably profiling a candidate's stand on certain issues which is paid for and written by the contributor, in which the advertisement does "express the underlying basis for his support," and *does* discuss candidates and issues, but for which the expenditure is done in coordination with, or with the authorization of, the candidate. It can only be surmised that the Buckley majority

purposely left this issue for another case. [\[FN46\]](#) In many respects this is that case. [\[FN47\]](#)

[FN45.](#) This Court is loathe to add to the already arcane vocabulary of federal campaign finance regulation. However, as will be seen, the First Amendment requires different treatment for "expressive," "communicative" or "speech-laden" coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff. As used in this Opinion, an "expressive coordinated expenditure" is one for a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign. A mere expenditure to increase the volume of the candidate's speech by funding additional purchases of campaign materials--posters, buttons, leaflets, etc.--does not raise the same type of First Amendment concerns that are at issue here. Cf. [2 U.S.C. § 441a\(a\)\(7\)\(B\)\(ii\)](#) (treating as a contribution "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials *prepared by the candidate* ") (emphasis added) (This subsection does not require coordination and would appear on its face to prohibit an individual from independently adopting the candidate's speech as his own.).

[FN46.](#) Two Justices in dissent attacked the contribution/expenditure distinction on precisely these grounds but drew no response from the majority. See [Buckley, 424 U.S. at 243, 96 S.Ct. 612](#) (C.J. Burger, concurring in part and dissenting in part) ("Whether the speech is considered an impermissible 'contribution' or an allowable 'expenditure' turns, not on whether speech by 'someone other than the contributor' is involved, but on whether the speech is 'authorized' or not."); [id. at 252, 261, 96 S.Ct. 612](#) (White, J., concurring in part and dissenting in part) (decrying differing results

under the Act if two brothers place identical television spots favoring a candidate--one with coordination, and the other without--concluding that "[t]he Act as cut back by the Court thus places intolerable pressure on the distinction between 'authorized' and 'unauthorized' expenditures on behalf of a candidate.").

[FN47.](#) The precise case left open by [Buckley](#) would involve an expressive coordinated expenditure by an individual. Such facts were presented in [United States v. Golan](#), in which the Ninth Circuit upheld the criminal FECA conviction of a contributor who scripted and funded a television advertisement for a third-party candidate in coordination with the candidate, [959 F.2d 1449, 1452 \(9th Cir.1992\)](#). This was done even though the defendant's ultimate goal in scripting and funding the spot was to use the third-party candidate's statements to throw support to one of the major-party candidates. But, the [Golan](#) court was not presented with a direct First Amendment challenge to the government's theory that expressive coordinated expenditures, such as television spots scripted by the contributor, are contributions subject to FECA's limitations and therefore it did not discuss the issue in those terms.

***86 2. "Coordination"**

Because the Act by its terms applies to the Coalition's expenditures on voter guides, the question presented is whether the First Amendment requires a limiting construction of the Act that would protect the Coalition's expenditures in this case. More specifically, under the First Amendment, are a corporation's expenditures on voter guides and get-out-the-vote telephone calls "independent" of a campaign or "coordinated with" the campaign where the evidence shows, among other things, that the corporation was privy to non-public information about a campaign's strategies and discussed the corporation's plans to make campaign-related expenditures in advance with the campaign? [\[FN48\]](#)

[FN48.](#) Cf. [Clifton v. Federal Election Comm'n](#), [114 F.3d 1309, 1326 \(1st Cir.1997\)](#) (Bownes, J., dissenting) ("[T]he question here is whether the degree of coordination

between MRTLC and the candidates in preparing the voter guides is sufficient to treat the money spent to produce and distribute the guides as a contribution and therefore regulable, taking into account constitutional requirements.").

If the contacts at issue in this case are constitutionally insignificant, the expenditures remain "independent," and only violate [§ 441b](#) if the voter guides, voter identification calls, and get-out-the-vote calls constitute "express advocacy," which the FEC concedes they do not. Nonetheless, if on these facts the Coalition's expenditures were "coordinated," and were therefore "contributions" for constitutional purposes, are they automatically prohibited by [§ 441b](#) or does the First Amendment require a limiting construction of statutory "contributions" with respect to expressive coordinated expenditures?

Regrettably, neither the parties nor *amici* appear willing to confront the real difficulties posed by this case. On the one hand, the Coalition and *amici* argue that because a corporation or union's own speech is involved in expressive coordinated expenditures, [§ 441b](#)'s limitation can only apply to "express advocacy" no matter how thoroughgoing the coordination of the speech may be. On the other hand, the FEC argues that *Buckley* already conducted the interest balancing with respect to coordinated expenditures--including expressive coordinated expenditures--and decided these were contributions subject to dollar limitations for individuals, PACs, and political parties, and subject to a total prohibition for corporations and labor unions. Alternatively, the FEC argues that even if *Buckley* left the issue open, the Supreme Court's authorization of prophylactic rules on contributions extends to prophylactic prohibitions on expressive coordinated expenditures. [\[FN49\]](#)

[FN49.](#) See *Colorado Republican*, 518 U.S. at 627, 116 S.Ct. 2309 ("The central holding in *Buckley* ... is that spending money on one's own speech must be permitted...."). Subsequent to the events in this case, the FEC codified its views on coordination between campaigns and those who prepare voter guides. See 11 C.F.R. [§ 114.4\(c\)\(4\), \(5\)](#). Over a vigorous dissent, the First Circuit rejected the FEC's argument that its rule, which, among other things, requires those preparing voter guides to communicate with candidates about the

guides only in writing, was justified as a necessary prophylactic. See *Clifton*, 114 F.3d at 1317.

3. Expressive Coordinated Expenditures Are Not Limited To "Express Advocacy"

[\[5\]](#) The Coalition and *amici* advance the argument that the "express advocacy" [*87](#) limitation must apply to expressive coordinated expenditures on both quasi-statutory and constitutional grounds. The quasi-statutory argument is that under Supreme Court precedent, the term "expenditure" has been limited throughout the Act to express advocacy. This position is untenable. [\[FN50\]](#) Indeed, in direct contrast to the Coalition's position in this case, *Orloski* held that the "express advocacy" standard was not constitutionally required for statutory provisions limiting contributions. *Orloski*, 795 F.2d at 167. [\[FN51\]](#)

[FN50.](#) *Buckley* read an express advocacy standard into the statutory provisions regarding independent expenditures "relative to" a clearly identified candidate, 424 U.S. at 46-47, 96 S.Ct. 612, and independent expenditures "for the purpose of influencing any election for Federal office," *id.* at 79-80, 96 S.Ct. 612; see also *CAN II*, 110 F.3d at 1051. The express advocacy standard was coined to cure the vagueness inherent in those two phrases--"relative to" and "for the purpose of ... influencing"--but for ease of reference the Court adopted a shorthand by which the express advocacy standard applied to certain "expenditures." See *id.* at 80, 96 S.Ct. 612 ("[W]e construe "expenditure" for purposes of that section [§ 434] in the same way we construed the terms of [§ 608\(e\)](#) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.") (emphasis added) (footnote omitted).

The Coalition advances a fanciful interpretation of *Buckley*. In the context of discussing FECA's disclosure obligations, the *Buckley* Court reaffirmed that the term "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley*, 424 U.S. at 78, 96 S.Ct. 612. Because, as the *Buckley* Court had explained

earlier in its Opinion, such coordinated expenditures involve a limited amount of speech by the contributor, the Court found that the First Amendment did not require a narrowing understanding of "expenditure" as used in the above-quoted sentence. The Court used the term "expenditure" in the phrase "expenditures placed in cooperation with or with the consent of a candidate" advisedly, leaving intact, the normal, broad meaning Congress had given it. However, with respect to the statutory term "expenditure," which the Buckley Court interpreted to mean "independent expenditure," the doctrine of unconstitutional vagueness required that Congress's broad definition be narrowed to expenditures on communications containing express advocacy. The reason, again, was because restrictions on independent expenditures directly burdened substantial amounts of core political speech. See id. at 79-80, 96 S.Ct. 612. Consequently, with regard to "coordinated expenditures" there is no constitutional need to narrow the definition of the term "expenditure" given by Congress.

In MCFL, the Court again focused on vagueness problems in the statute's language connecting independent corporate or union expenditures to federal elections: either "in connection with" or "for the purpose of influencing." See MCFL, 479 U.S. at 245-48 & n. 3, 107 S.Ct. 616; see also Federal Election Comm'n v. National Organization for Women, 713 F.Supp. 428, 433 (D.D.C.1989). Adopting Buckley's shorthand, the MCFL Court announced: "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." MCFL, 479 U.S. at 249, 107 S.Ct. 616.

This shorthand reference to "expenditures" for which an "express advocacy" requirement exists is limited to those statutory phrases for which the First Amendment required a narrowing construction and does not generally limit the term "expenditure" as used throughout the FECA. See Colorado Republican, 518 U.S. at 614-15, 116 S.Ct. 2309 (plurality) (referring to "the Court's precedents that extend First Amendment protection to independent expenditures") (emphasis added); cf. Orloski, 795 F.2d at 167.

FN51. The Coalition dismisses Orloski's holding on this point as "*dicta*," arguing that it was superseded by MCFL, but MCFL construed the Act only with regard to independent expenditures, leaving in place Buckley's treatment of coordinated expenditures as contributions. See MCFL, 479 U.S. at 249, 259-60, 107 S.Ct. 616.

In the alternative, the Coalition and amici argue that even if the question remains open, the First Amendment requires that § 441b's contribution prohibition on expressive coordinated expenditures also be limited to "express advocacy." This argument is unpersuasive.

It may be--if the Ninth Circuit's Goland opinion is fully consistent with the First Amendment--that this is an *a fortiori* case. For, if an individual can be criminally charged and convicted for making an *88 illegal in-kind contribution by (1) scripting and producing a candidate's campaign-related television appearance in concert with the candidate, Goland, 959 F.2d at 1452, (2) expending a sum considerably in excess of the limit on campaign contributions on the television appearance, id. at 1451, (3) without the television appearance expressly advocating the election or defeat of a clearly identified candidate, id. at 1455 (Pregerson, J., dissenting), then surely a corporation that writes a communication "for the purpose of influencing a federal election" in concert with a candidate's campaign can be held civilly liable for making an illegal in-kind contribution even when that communication does not contain "express advocacy."

However, even if Goland does not provide a sound basis for rejecting the Coalition's argument, it must also be rejected because importing the "express advocacy" standard into § 441b's contribution prohibition would misread Buckley and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat. Cf. 2 U.S.C. § 441a(a)(7)(B)(ii).

For example, expensive, gauzy candidate profiles prepared for television broadcast or use at a national

political convention, which may then be broadcast, would be paid for from corporate or union treasury funds. Such payment would be every bit as beneficial to the candidate as a cash contribution of equal magnitude and would equally raise the potential for corruption. Cf. Buckley, 424 U.S. at 36-37, 96 S.Ct. 612. Even more pernicious would be the opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning. Coordinated expenditures for such communications would be substantially more valuable than dollar-equivalent contributions because they come with an "anonymity premium" of great value to a candidate running a positive campaign. Allowing such coordinated expenditures would frustrate both the anti-corruption and disclosure goals of the Act. The First Amendment requires that the statute be construed to permit only narrowly tailored restrictions on speech that advance the Government's anti-corruption interest, but the Coalition's position allows for no restrictions at all on such expenditures.

Finally, the proposed benefit of this allegedly "bright-line" standard--greater First Amendment clarity--is largely illusory. The Coalition and *amici* argue strenuously that the legal standard for "coordinated expenditures" must be sufficiently clear to minimize the FEC's intrusive investigations into communications between corporations or labor unions and candidates. [\[FN52\]](#) But their proposed standard only minimizes the pool of matters that may be investigated by requiring as a predicate that the questioned activity involve "express advocacy." Even within that pool, the real issue, as both Chief Justice Burger and Justice White recognized, is whether an expenditure is "authorized" by a campaign or "coordinated" with the campaign, a necessarily fact-intensive inquiry allowing for extensive FEC inquiry into the nature and extent of communications between the alleged contributor and campaign. This Court fully agrees that the standard for coordination must be restrictive, limiting the universe of cases triggering ^{*89} potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions. But some room for fact-intensive inquiry is inevitable.

[FN52.](#) While the Coalition bitterly

complains about the extent of discovery in this case, it should be noted that the Coalition did not file a motion under [FED. R. CIV. P. 12\(b\)\(6\)](#), as it could have done, to test the legal sufficiency of the FEC's coordination theory in advance of discovery.

As a final alternative, the Coalition suggests that the test for coordination of expressive expenditures should be whether the corporation or union would have made the expenditure but for the intercession of the candidate or his staff. While closer to the mark, this standard also defines "coordination" too narrowly, leaving unregulated expressive expenditures proposed by the corporation or union and negotiated with the campaign.

4. An "Insider Trading" or Conspiracy Standard is Overbroad

At the other end of the spectrum is the FEC, which argues that any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election "coordinated," i.e., contributions. [\[FN53\]](#) The FEC borrows from two statutory provisions and one of its regulations for support of this standard. [\[FN54\]](#) While these provisions ^{*90} are a logical starting point, it must be remembered that because "coordination" marks the constitutional dividing line between corporate contributions subject to prohibition and protected issue-oriented expenditures, that line ultimately is drawn by reference to the First Amendment, not the Act.

[FN53.](#) The Coalition and *amici* characterize this standard as posing a "Hobson's choice of constitutional dimension" between either lobbying the campaign on issues but spending no money on the election (for fear that the FEC will deem such expenditures "coordinated") or remaining walled off from the campaign so that all campaign-related expenditures are clearly independent. The FEC rejoins that its standard is no different than a drunk driving law, which permits an adult to drink or to drive but prohibits the dangerous mixture of the two activities. It is the Commission's view that contact between a potential spender and a campaign about the candidate's strategy along with discussion of the candidate's stand on issues

is a similarly dangerous combination, making the opportunities for corrupt bargains palpable.

[FN54.](#) The FEC comes to its understanding of a "coordinated expenditure" by relying on [§ 441](#) a(a)(7)(b), which provides that for purposes of subsection (a) [which does not apply to the Coalition]:

(i) expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.

[2 U.S.C. § 441a\(a\)\(7\)\(B\)\(i\).](#)

The FEC also considers a "coordinated expenditure" to be the partial converse of a [§ 431\(17\)](#) "independent expenditure," which is an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate ... and which is not made in concert with, or at the request or suggestion of, any candidate...

[2 U.S.C. § 431\(17\).](#) [Section 431\(17\)](#) defines "independent expenditures" that must be reported under [§ 434\(c\)](#). Because a corporation, such as the Coalition, may not make independent expenditures, corporations, unions and national banks are not "persons" within the meaning of [§ 431\(17\)](#).

By regulation, the FEC has elaborated that under [§ 431\(17\)](#):

Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate--

(i) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. *An expenditure will be presumed to be so made when it is--*

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend

funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.

[11 C.F.R. § 109.1\(b\)\(4\).](#)

An expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted.

Id. [§ 109.1\(c\).](#)

For that reason, the FEC's "insider trading" or conspiracy approach to coordination is overbroad, at least with respect to expressive coordinated expenditures. To be sure, the scenario the FEC paints to support its approach is plausible: A corporate or union representative meets with campaign staff on one or more occasions and receives non-public information about the campaign's strategy; the corporate or union representative learns that the campaign seeks to highlight one or more of the candidate's policy positions before a specific constituency; acting on the "tip," the corporation or union expends or "invests" considerable sums from its "war chest" to pay for communications highlighting said policy position(s) before said constituency; after the candidate is elected, the corporation or union seeks to profit from its investment by demanding special access to the elected official or a legislative *quid pro quo*.

Added to this, is the Supreme Court's determination that the corporate form, which allows and promotes the massive aggregation of wealth, is a special State-conferred benefit which may, in some instances, lead to differential treatment under the First Amendment to account for special corporate features. *See, e.g., NCPAC*, 470 U.S. at 495, 105 S.Ct. 1459.

Nonetheless, while this plausible scenario demonstrates that the potential for corruption flowing from coordinated expenditures is non-speculative, the prohibition on such expenditures must be narrowly tailored to meet this danger. An "insider trading" or conspiracy approach also sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters. *Cf. Clifton*, 114 F.3d at 1313 (FEC's bar on oral contact regarding voter guides is an overbroad prophylactic rule). The FEC believes that its concept of coordination is narrowly tailored to the anti-corruption interest because its

definition "reaches only those expenditures that are made after consultation with a candidate concerning campaign strategy or activities, not mere lobbying or asking a candidate or incumbent where she stands on a particular policy issue or proposed legislation." FEC Reply Mem. at 9.

But as the facts of this case demonstrate, discussion of campaign strategy and discussion of policy issues are hardly two easily distinguished subjects. See [Buckley](#), 424 U.S. at 249, 96 S.Ct. 612 ("Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."). The FEC's tidy distinction between discussion of campaign strategy and mere lobbying is cold comfort for those who seek to discuss with a candidate an issue that is at the time dominating the campaign. Indeed, the record in this case demonstrates that a candidate's decision when to take a stand, where to stand, and how to communicate the stand on a policy issue often are integral parts of campaign strategy. The facts further demonstrate that a candidate frequently listens to the concerns of sympathetic constituencies or factions before making those important strategic decisions. While the FEC's approach would certainly address the potential for corruption in the above-described scenario, it would do so only by heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign.

At oral argument in this case, the Court pressed both parties to provide their proposed legal standard for defining the activities that would amount to "coordination" of expenditures. Perhaps for institutional reasons, neither party was particularly responsive. *91 For its part, the FEC considered this an easy case, arguing that even if it is difficult to say precisely where coordination starts and ends, on the facts of this case, this is coordination. [FN55] This Court cannot so readily agree.

[FN55](#). See [Clifton](#), 114 F.3d at 1311 (noting that FEC's voting guide regulation does not define "coordination"); cf. [Jacobellis v. Ohio](#), 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring) (explaining that when it comes to hard core pornography lying outside the protection of the First Amendment, "I know it when I see it").

Not only does the FEC's approach heavily burden

communication leading up to the expenditure, but it also neglects the fact that expressive coordinated expenditures contain the political speech of the spender; more than the "speech by proxy" involved in a cash contribution. See [Colorado Republican](#), 518 U.S. at 638-39, 116 S.Ct. 2309 (Thomas, J., dissenting). This Court is bound by both the result and the reasoning of [Buckley](#), even when they point in different directions. While [Buckley](#) confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. See [Colorado Republican](#), 518 U.S. at 624, 116 S.Ct. 2309 (plurality); [Clifton](#), 114 F.3d at 1325 (Bownes, J., dissenting) (coordinated expenditure on voter guide "occupies a middle ground"). I take from [Buckley](#) and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.

5. "Coordination" Defined

[6] First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association. This Court will only address coordination as it applies to expressive coordinated expenditures by corporations. The interest-balancing process may well yield different results for non-expressive coordinated expenditures or for expressive coordinated expenditures by individuals.

[Buckley](#) drew from the FECA's legislative history the concept of "coordinated expenditures" in response to those who feared that the Act's constitutionally permissible contribution limitations could be easily circumvented through coordinated expenditures. A narrowly tailored definition of expressive coordinated expenditures must focus on those expenditures that are of the type that would be made to circumvent the contribution limitations.

A contribution provides the candidate with

something of value that she wants or needs. Fungible contributions, cash, provide the candidate with the most flexibility. The government's compelling interest arises from the recognition that as the magnitude of a contribution grows, so grows the likelihood that the candidate will feel beholden to the source of those contributors. And, once elected, the candidate may feel obliged to take official action that is not in the public interest to meet the demands of the contributor.

An expressive coordinated expenditure is not fungible and its value to the candidate depends on the circumstances. That portion of the FEC's approach which would treat as contributions expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent is narrowly tailored. *92 The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions.

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Admittedly, a standard that requires "substantial" anything leaves room for factual dispute. The possibility that the FEC may deem a corporation or union's pre-expenditure discussions or negotiations with a campaign to be "substantial" will chill some speech. But expressive coordinated expenditures present real dangers to the integrity of the electoral process. This standard balances those considerations. As my former colleague on this Court, Judge Michael Boudin, recently wrote:

[W]e readily accept that the government has an interest in unearthing disguised contributions. But

the FEC is free to investigate any instance in which it thinks that inquiry has become collaboration; nothing, apart from conclusory allegations, has been offered by the FEC to suggest that ordinary enforcement measures cannot adequately police "secret" corporate contributions.

[Clifton, 114 F.3d at 1315.](#)

C. Applying the Standard

[7] The FEC argues that the frequent contacts between high-level Coalition officials and the campaign staffs of various federal candidates in advance of the Coalition's expenditures on voter guides and get-out-the-vote telephone solicitations was sufficient coordination to treat those expenditures as campaign contributions. Because the focus for each campaign is on those two types of expressive coordinated expenditures, the Court will apply the standard to those types of communications in general and then briefly discuss any campaign-specific variations.

1. Voter Guides

Voter guides can involve varying degrees of expression. At issue here, with the exception of the Coalition's 1992 tabloid voter guide, are single-page guides that identify an issue with a single phrase and represent the candidate's position with one of three options: "supports," "opposes," or "did not respond." To illustrate, Appendix A to this Opinion is the single-page October version of the Coalition's 1992 presidential election guide. To produce these guides, the Coalition drafted a candidate questionnaire that sought a response to questions asking whether the candidate supports or opposes a wider range of issues than is presented on the voter guide.

Under the standard for coordination articulated herein, discussion or negotiation over the contents of the guide includes discussion of how an issue is phrased on the guide--for example "homosexual rights" versus "human rights"--and which issues are, or are not, to be included in the guide. Cf. [11 C.F.R. § 114.4\(c\)\(4\)](#). Similarly discussion of which issues are included in the candidate survey, or the phrasing *93 of the questions thereon, also would be coordination.

More difficult is determining when discussions with a campaign regarding whether the candidate "supports" or "opposes" an issue become coordination. Cf. [Clifton, 114 F.3d at 1316](#) (interpreting FEC's position on coordination to include conversation with incumbent's campaign on

how to interpret candidate's apparently conflicting votes). Such conversations lie in the heartland of protected political discussion but also involve considerable incentives to engage in corrupt practices. To become coordination, the conversation between a corporation preparing a voter guide and the candidate must go well beyond inquiry into negotiation. For example, if the corporation's interpretation of the candidate's prior statements or votes would lead it to say he "opposes" the issue, and the campaign tries to persuade the corporation to use "supports" on the guide, that is coordination. Realistically, it may well be difficult for the FEC to prove the existence of such negotiation--which is why it argues that it needs a prophylactic rule--but any less restrictive interpretation of coordination would impermissibly chill protected expression.

Turning to the remaining forms of coordination, discussions of the timing, location of distribution, or volume of voter guide distribution also must transgress mere inquiry. A corporation's mere announcement to the campaign that it plans to distribute thousands of voter guides in select churches on the Sunday before election day, even if that information is not yet public, is not enough to be coordination. Coordination requires some to-and-fro between corporation and campaign on these subjects.

2. "Get-Out-The-Vote"

Similarly, coordination of expenditures on get-out-the-vote telephone exhortations must rise to the level of discussion or negotiation over (1) the contents of the script; (2) when the calls are to be made; (3) the "location" or audience, including discussion of which databases are to be used; or (4) the number of people to be called.

3. The Campaigns

From these principles of application, it appears that the Coalition avoided impermissible coordination of its voter guide and GOTV expenditures, although not for lack of trying. The primary reason that these expenditures were not coordinated is that campaign staff, armed with foreknowledge of the Coalition's plans, chose not to respond to the Coalition's implicit offers to discuss or negotiate those plans.

a. 1992 Presidential Election

The facts regarding coordination are the most extensive in relation to Bush- Quayle '92. The predicate for the FEC's theory of liability is that the Coalition, through Reed and Robertson, had special

access to the Bush campaign's strategy. In fact, Reed frequently offered the campaign advice, much of which was either followed or implemented independently. Additionally, Reed and Robertson repeatedly reminded the campaign about the Coalition's plans to distribute voter guide and make GOTV calls. And, President Bush attended a Coalition fundraising event, perhaps with the understanding that funds raised would go to cover voter guide costs. The FEC argues that Reed and Robertson either acted on behalf of the Coalition when interacting with the Bush campaign or their knowledge of the Bush campaign's strategy is imputed to the Coalition. In either case, the FEC asserts that the Coalition's expenditures of voter guides and GOTV calls were made with that knowledge to dovetail with the campaign's strategy.

As a preliminary matter, the Coalition argues that many of Robertson's and Reed's actions were done in their personal capacities and should not be attributed to the Coalition. The Coalition would have it *94 that unless Robertson or Reed expressly indicated he was acting in his Coalition capacity, his actions were taken as a private individual. This Court cannot accept that formulation; the First Amendment does not provide for general preemption of the state-law doctrine of apparent authority. Robertson and Reed frequently did not specify the capacity in which they acted. [\[FN56\]](#) It is true that corporate officers retain their individual First Amendment rights even when the First Amendment allows regulation of corporate speech, but the burden is on the speaker to establish whether his speech is individual or on behalf of the corporation.

[FN56.](#) When asked why his campaign would seek the endorsement of Pat Robertson, President Bush testified: "He had this huge circulation in the media and he, I believe, was the head of the Christian Coalition, which gave me support at various times." FEC Ex. 7 at 33.

Whether as private individuals or as corporate officers, Robertson and Reed clearly had special access to Bush-Quayle '92. Reed had extensive discussions concerning the campaign's thinking on a number of strategic issues. But the evidence also demonstrates that it was the Coalition that did most of the talking. Although the Coalition might qualify as a "special interest group" in today's parlance, it really is better described as a "faction" as that term was used in the eighteenth century. See, e.g., FEC

Ex. 85 (Reed Montana Speech) at 33 ("Remember we're a minority. We're very ideologically motivated, very zealous, very excited."). Fervently focused on certain issues, the Coalition was one of many factions competing for the attention of Bush-Quayle '92's staff. The Coalition was in a position to advance its views both by shouting at the White House, ("we are getting more action on this issue from a liberal Democratic Governor than we have seen out of the Bush administration," FEC Ex. 035-0255), and by whispering in the campaign's ear, ("[a]s in the past, churchgoing evangelical Protestants and pro-family Catholics are the key to the resurrection of George Bush," FEC Ex. 023-000537 (Reed's strategy memo to campaign chairman Teeter)).

It is within this context that the Coalition advised the campaign of its plans for the volume of voter guides--40 million--planned for the 1992 election. The purpose of sharing this information clearly was to attract the attention of the campaign to the issues of greatest concern to the Coalition. The FEC makes much of the fact that this information was passed on to the campaign before it was made public. But campaign staff did not initiate a discussion or negotiation in response. More troubling is the evidence indicating that the campaign was advised that \$500,000 was needed to meet the costs of voter guide production and that President Bush's fundraising appearance at the 1992 Road to Victory conference was intended by the Coalition and the campaign to raise that amount for that purpose. However, the evidence is too thin to support a holding that the sharing of information about the cost of producing 40 million voter guides was coordination. Even if the evidence incontrovertibly established that Bush's Road to Victory appearance was to fund the Coalition's voter guides, that by itself does not turn the corporation's subsequent expenditures into illegal campaign contributions.

Moreover, evidence of the other types of coordination are absent. The Bush- Quayle '92 campaign did not request or suggest that the Coalition make certain expressive expenditures. The campaign did seek Pat Robertson's endorsement, and did rent a mailing list from the Coalition to enhance the value of that endorsement, but the FEC has not alleged that either Robertson's endorsement or the rental terms were prohibited contributions as "things of value" given to the campaign.

The campaign was generally aware that on the Coalition's voter guides, President Bush would compare favorably--in the eyes of the target

audience-- with candidates Clinton and Perot. But Bush-*95 Quayle '92 staff did not enter into discussions or negotiations with the Coalition to produce that result. The Coalition may well have designed its 1992 presidential voter guides with non-public information gained by Reed from his proximity to the campaign, but, as the Court has explained, the First Amendment does not allow coordination to be inferred merely from a corporation's possession of insider knowledge from a federal candidate's campaign. Some more overt acts of coordination are required.

In other words, the campaign did not take action to suggest that it was a partner or joint venturer in the Coalition's voter guides. Campaign staff did not seek to discuss the issues that would be profiled or how they would be worded. Campaign staff did not respond when the Coalition advised that the guides would be distributed the Sunday before election day through select churches, and campaign staff did not seek to discuss increasing or decreasing the Coalition's 40 million target. The mere fact that the Coalition was singing from the same page as the Bush campaign on certain issues does not establish coordination. With regard to the Coalition's get-out-the-vote calls, the record is similarly devoid of evidence showing coordination.

Consequently, despite the close contacts between the Coalition and Bush-Quayle '92 throughout the 1992 presidential campaign, the evidence does not show that the Coalition coordinated its expenditures on voter guides or GOTV calls with the campaign.

b. Helms for Senate

By contrast to the evidence concerning Bush-Quayle '92, the FEC's evidence for coordination in the 1990 senatorial election in North Carolina is its weakest. In a nutshell, the FEC argues that Reed was privy to Senator Helm's private opinion polls showing that Helms was trailing and that the Coalition used this knowledge to target North Carolina as one of seven states in which to expend funds on voter guides and the only state in which to expend funds for GOTV calls. Not only is it factually questionable on this record whether Helms' poor standing in the polls prior to the election was "inside knowledge," but additionally there is no evidence or allegation that the Helms campaign requested or suggested that the Coalition distribute voter guides or make GOTV calls nor did the campaign discuss the content, timing, location or volume of the voter guides with the Coalition. The Coalition's expenditures on the 1990 senatorial election in North Carolina were not in-kind

contributions to the Helms campaign.

c. Inglis for Congress

The FEC's evidence with respect to the 1992 election in the Fourth Congressional District of South Carolina also is built solely on its insider trading or conspiracy theory. Beverly Russell was a Coalition official and a volunteer for the Inglis campaign. Though Russell was privy to various campaign strategies, the FEC does not link that knowledge to any discussion or negotiation of the Coalition's expenditures on voter guides. The FEC asks the Court to infer that because Russell knew that the Inglis campaign sought to downplay Inglis' anti-abortion position, the Coalition's decision to include the abortion issue on its voter guide and to distribute the guides to the specific constituency for whom Inglis' anti-abortion stance would be most important, was done to facilitate the Inglis campaign's strategy.

The evidence does not support the inference. It may have been recognized by both the campaign and the Coalition that the targeted distribution of its voter guides would assist the Inglis campaign, but there is no evidence of discussion or negotiation to bring that result about. From this record, it seems the Coalition's voter guides tended to focus on the same range of issues across elections--abortion being almost universal--and in the Coalition relied extensively, if not exclusively, on churches to distribute its guides in many *96 elections. The FEC simply has not shown that the Inglis campaign became a partner in the Coalition's voter guide expenditures, and therefore those expenditures were not impermissible campaign contributions.

d. North for Senate

The evidence of coordination is quite close with respect to the 1994 Virginia senatorial election, with certain material facts being in dispute. Some senior Coalition personnel had close personal and professional ties to senior staff of the North campaign. Through these contacts, the Coalition became privy to much of the North campaign's strategic information.

But, as with the campaigns discussed above, the FEC has not shown that these discussions touched on the Coalition's plans to expend general corporate funds on voter guides and GOTV calls--with one possible exception. The deposition testimony of North's political director, Thomas Bunnell, raises a genuine issue of material fact as to whether North's campaign manager, Timothy Carpenter, discussed with Reed

which issues should appear on the Coalition's voter guide. See FEC Ex. 6 (Bunnell Dep.) at 65. While Carpenter denies having had such discussions, the conflicting testimony is sufficient to raise a credibility issue that cannot be resolved on summary judgment. Aside from this possible coordination, the evidence on this record does not demonstrate any other form of coordination as to the Coalition's voter guides and GOTV calls.

[8] However, the facts also demonstrate that the Coalition provided the North campaign with another thing of value--the Farris list. Even if the names on the Farris list were publicly available, the fact that the Coalition expended resources to compile the list and cross-check it with the Coalition's house file, created value that was passed on to the North campaign. The record demonstrates that mailing lists have commercial value and are routinely rented for fundraising or other solicitation purposes. Contrary to Reed's opinion at the time, the fact that the Coalition gave the list to North's campaign consultant, Joe Elton, instead of a campaign volunteer did not take the transaction outside the scope of § 441b(a). See 2 U.S.C. § 441b(b)(2) ("a 'contribution or expenditure' shall include any gift of ... anything of value ... to any candidate...."). The FEC's complaint encompasses this conduct and entitles it to relief. The Court will leave the amount of any civil penalty to be assessed in this regard for determination after resolving the factual dispute concerning the Reed-Carpenter discussions and after receiving evidence concerning the fair market value of the Farris list.

e. Hayworth for Congress

Again relying on its insider trading or conspiracy theory, the FEC alleges that the knowledge gained by Coalition official Thomas Grabinski through his volunteer activities for the Hayworth campaign should be imputed to the Coalition and that the Coalition's special efforts to target Hayworth's campaign to represent the Sixth Congressional District of Arizona resulted from access to that non-public knowledge. As should be obvious, those facts are insufficient to show coordination. While Grabinski was the person primarily responsible for deciding which churches would receive voter guides, he did not make his decisions based on any discussions or negotiations with the Hayworth campaign. The FEC argues that because Grabinski was both a Coalition and campaign insider, it must be inferred that Grabinski coordinated the voter guide distribution with himself

The Court cannot so readily engage in this veil-piercing. Not only would it burden associational rights, but the evidence also shows that Grabinski's position in the campaign was such that his view of where the campaign might want the guides distributed would not necessarily be the candidate's view. A veil-piercing approach to coordination may be appropriate if an individual *97 had more complete decisionmaking authority for both a corporation and a campaign and the evidence indicated that corporate decisions to make expressive expenditures were taken to assist the campaign. But on these facts, coordination cannot be inferred merely from the fact that the Coalition's voter guide distributor wore two caps. Some discussion or negotiation is required.

f. NRSC

[9][10] Notwithstanding the fact that it was the NRSC that gave the Coalition \$64,000, the FEC contends that the Coalition made an illegal contribution to the NRSC. As an initial matter, the Court agrees with the FEC that the contribution prohibition, as defined in [§ 441](#) b(b)(2), applies to corporate contributions to national party committees, such as the NRSC.

It is undisputed that the money NRSC gave the Coalition was spent on voter guides. The NRSC sponsored the Coalition's speech, but it did so explicitly acknowledging that it could not become a partner in that speech by discussing its contents or points of distribution. It is possible that the Coalition could be viewed as having donated a "service" to NRSC (converting its funds into voter guides) in violation of [§ 441b\(a\)](#). But that would be a troublesome interpretation of the term "service."

[11] A corporation's expressive expenditure becomes an illegal contribution when the candidate, or in this case the party committee, becomes a partner in the corporation's speech. Expressive coordinated expenditures are treated as contributions to avoid circumvention of the contribution limits. The dangers of circumvention are not apparent from these facts. As the Supreme Court has now clarified, the NRSC could independently spend unlimited amounts in support of its candidates. [Colorado Republican, 518 U.S. at 626, 116 S.Ct. 2309](#) (plurality announcing the judgment). Unless the facts were such as to demonstrate that the Coalition was providing the NRSC with an anonymity premium, these facts do not indicate that the Coalition's production and distribution of voter guides with the NRSC's money were an illegal contribution to the

NRSC.

CONCLUSION

For the reasons stated, it is hereby

ORDERED that the FEC's Motion for Summary Judgment is granted in part and denied in part consistent with this Opinion; it is

FURTHER ORDERED that Christian Coalition's Motion for Summary Judgment is granted in part and denied in part consistent with this Opinion; it is

FURTHER ORDERED that pursuant to [Rule 54\(b\) of the Federal Rules of Civil Procedure](#), judgment shall be entered forthwith on Count II in favor of the Coalition as there is no just reason for delay. It is

FURTHER ORDERED that as to Count I, partial judgment shall enter in favor of the Coalition. The FEC is entitled to partial judgment on Count I as to the Farris list and may also be entitled to judgment on its other claims in regard to the 1994 Virginia senatorial election. Resolution of the outstanding factual matters shall await the outcome of an appeal, if there be any.

FURTHER ORDERED that as to Count III the Coalition and the FEC are both entitled to partial judgment. Judgment for the Coalition shall enter in respect to the allegations concerning Reed's 1992 Montana speech and the Coalition's "Reclaim America" mailing. As to the FEC's allegations concerning the Coalition's Georgia mailing in support of the 1994 reelection campaign of Newt Gingrich, a declaratory judgment in the FEC's favor shall enter forthwith. Decision on the amount of civil penalty shall await the *98 outcome of an appeal, if there be any. It is

FURTHER ORDERED that the Court has finally resolved the majority of claims at issue in this case. Because many of those claims were bundled into single counts, the Court cannot enter final judgment on the entirety of Counts I and III. A separate judgment page is entered herewith for Count II and those aspects of Counts I and III that have been finally resolved so as to permit an appeal under [Rule 54\(b\)](#) as there is no just reason for delay. It is

FURTHER ORDERED that, in the alternative, if [Rule 54\(b\)](#) requires that all the claims within a single count be resolved before partial judgment can enter, this Court is of the opinion that this Order in relation to Counts I, II, and III involves controlling questions of law as to which there is substantial groundfor

difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. See [28 U.S.C. § 1292\(b\)](#). It is

FURTHER ORDERED that the Court shall schedule a pretrial conference and trial at such time as any appeal has been finally resolved or upon the expiration of the time in which to file an appeal. [\[FN57\]](#)

[FN57.](#) The Court appreciates the difficulty the parties will have in measuring that time--either 60 days or 10 days--depending upon the view the Court of Appeals takes of [Rule 54\(b\)](#).

IT IS SO ORDERED.

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